JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Jul 24 12:19:34 2014

Han Fann Chour v Sim Yong Hua

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 23 NCVC-56–06 OF 2013
ABDUL RAHMAN SEBLI J
3 DECEMBER 2013

Civil Procedure — Summary judgment — Contract — Relief for specific performance of agreement for sale of land — Whether there was defence to action — Rules of Court 2012 O 81 r 1(a)

Contract — Sale and purchase of land — Draft agreement — Parties entered into preliminary agreement to purchase — Agreement subject to execution of formal sale and purchase agreement — Draft sale and purchase agreement prepared and forwarded for approval — Refusal to proceed with sale — Whether change of mind valid reason — Whether either party could claim right to change mind at any time before formally signing agreement — Whether there was legally binding contract between parties when draft agreement signed

This was an application by the plaintiff, a Singaporean national for summary judgment under O 81 r 1(a) of the Rules of Court 2012 ('the RHC'), seeking the relief for specific performance of an agreement for the sale of a piece of land on the basis that the defendant had no defence to the action. The dispute arose from an agreement to sell and purchase a parcel of land. The parties had entered into a preliminary agreement in writing called agreement to purchase ('the ATP') and by virtue of cl G.1 of the ATP, that the agreement was 'subject to the execution of a formal sale and purchase agreement (SPA)'. The agreed purchase price was RM1,179,376. However, before agreeing to the ATP, the defendant made amendments to the terms of the preliminary agreement by inserting cl D.4 where he limited the plaintiff's claim to liquidated damages only in the event the defendant failed to execute the sale and purchase agreement. A draft sale and purchase agreement was prepared and forwarded to the plaintiff for approval. The plaintiff promptly approved the draft agreement and returned it to the defendant for execution but the defendant refused to proceed with the sale. After keeping quiet for two months, the defendant wrote to the plaintiff informing him that the deal was off and refunded the 10% deposit to the plaintiff as he had a change of mind. The defendant claimed that he had every right to change his mind at any time before formally signing the sale and purchase agreement. The question for determination was whether there was a legally binding contract between the parties when the plaintiff signed the draft agreement.

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Jul 24 12:19:34 2014

Held, allowing the application in terms:

(1) The defendant failed to raise any triable issues to warrant a full trial of the action. Nor was there 'some other reason' for holding a trial. Although the ATP was expressed to be 'subject to the execution of a formal Sale & Purchase Agreement' the facts showed that a valid and enforceable contract had been formed between the parties (see para 6).

(2) It was clear that an objective intention to conclude an agreement had already existed between the parties. There was no dispute that in the course of the negotiation, both the plaintiff and the defendant had made amendments to the draft sale and purchase agreement, the final amendments being made by the defendant before it was forwarded to the plaintiff for his approval. This was reflected in the letter dated 21 February 2013 to the plaintiff from the defendant. In the same letter, the defendant agreed to extend time for the plaintiff to sign the draft sale and purchase agreement by one week (see paras 9–11).

(3) The extension of time was given at the plaintiff's request. As it turned out, the plaintiff did not wait until the extended date to sign the draft agreement. He decided to do so on the original deadline itself. At that point there was not only *consensus ad idem* between the parties but the necessary *animus contrahendi*. The defendant could not now turn around and say that he did not intend to be immediately bound by the terms of the approved draft (see para 11).

(4) It is trite law that parties could not contract out of a statutory provision. Order 81 r (1)(a) of the Rules allowed for the aggrieved party to apply for specific performance and no contractual term or the absence of such term in the contract could take away that right. Once the draft sale and purchase agreement had been approved by the plaintiff, it formed the contract between the parties and the ATP ceased to have effect. Further, land being immovable property, the matter fell squarely within the purview of s 11(2) of the Specific Relief Act 1950 (see para 18).

(5) This was a fit and proper case for summary judgment to be entered against the defendant pursuant to O 81 r 1 (a) of the Rules. Accordingly the plaintiff's application was allowed in terms (see para 21).

[Bahasa Malaysia summary

Ini adalah suatu permohonan oleh plaintif, seorang warganegara Singapura untuk penghakiman terus di bawah A 81 k 1(a) Kaedah-Kaedah Mahkamah 2012 ('KKM'), yang ingin memohon untuk pelaksanaan spesifik perjanjian bagi penjualan sebidang tanah atas dasar bahawa defendan tidak dapat membela dirinya dalam tindakan itu. Pertikaian timbul daripada satu perjanjian untuk menjual dan membeli sebidang tanah. Pihak-pihak telah memeterai perjanjian awal secara bertulis dipanggil perjanjian untuk membeli

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Jul 24 12:19:34 2014

('ATP') dan menurut klausa G.1 daripada ATP, bahawa perjanjian itu adalah 'subject to the execution of a formal sale and purchase agreement (SPA)'. Harga pembelian yang dipersetujui adalah sebanyak RM1,179,376. Walau bagaimanapun, sebelum bersetuju dengan ATP, defendan membuat pindaan kepada syarat-syarat perjanjian awal dengan memasukkan klausa D.4 di mana dia mengehadkan tuntutan plaintif terhadap ganti rugi jumlah tertentu hanya sekiranya defendan gagal melaksanakan perjanjian jual beli. Draf perjanjian jual beli telah disediakan dan dikemukakan kepada plaintif untuk kelulusan. Plaintif segera meluluskan draf perjanjian dan mengembalikan semula kepada defendan untuk pelaksanaan tetapi defendan enggan meneruskan jualan. Selepas berdiam diri selama dua bulan, defendan menulis kepada plaintif memberitahunya bahawa perjanjian itu adalah terbatal dan memulangkan deposit 10% kepada plaintif kerana dia telah berubahan fikiran. Defendan mendakwa bahawa dia mempunyai hak untuk menukar fikiran pada bila-bila masa sebelum secara rasmi menandatangani perjanjian jual beli. Persoalan untuk penentuan ialah sama ada terdapat kontrak mengikat antara pihak-pihak apabila plaintif menandatangani perjanjian draf.

Diputuskan, membenarkan permohonan mengikut terma-terma:

(1) Defendan gagal menimbulkan apa-apa isu yang boleh dibicarakan untuk mewajarkan tindakan perbicaraan penuh. Malahan juga tidak ada 'some other reason' untuk mengadakan perbicaraan. Walaupun ATP telah dinyatakan sebagai 'subject to the execution of a formal Sale & Purchase Agreement' fakta-fakta menunjukkan bahawa suatu kontrak yang sah dan boleh dikuatkuasakan telah dibentuk antara pihak-pihak (lihat perenggan 6).

(2) Ia adalah jelas bahawa niat objektif untuk memeterai perjanjian telah pun wujud antara pihak-pihak. Tidak ada pertikaian bahawa sewaktu rundingan, kedua-dua plaintif dan defendan telah membuat pindaan kepada draf jualan dan perjanjian pembelian, pindaan terakhir yang dibuat oleh defendan sebelum ia dikemukakan kepada plaintif untuk kelulusannya. Ini dapat dilihat dalam surat yang bertarikh 21 Februari 2013 untuk plaintif daripada defendan. Dalam surat yang sama, defendan bersetuju untuk melanjutkan masa bagi plaintif menandatangani draf perjanjian jual beli dalam masa seminggu (lihat perenggan 9–11).

(3) Lanjutan masa telah diberi atas permintaan plaintif. Maka, plaintif tidak menunggu sehingga tarikh lanjutan untuk menandatangani draf perjanjian. Beliau memutuskan untuk berbuat demikian dari tarikh akhir asal itu sendiri. Pada ketika itu bukan hanya terdapat *consensus ad idem* antara pihak-pihak tetapi *animus contrahendi* yang diperlukan. Defendan kini tidak dapat berpatah balik dan mengatakan bahawa dia

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Jul 24 12:19:34 2014

tidak berniat untuk segera terikat dengan terma draf yang diluluskan (lihat perenggan 11).

(4) Ia adalah undang-undang nyata yang pihak-pihak tidak boleh berkontrak luar daripada peruntukan berkanun. Aturan 81 k (1)(a) KKM membenarkan pihak yang terkilan untuk memohon pelaksanaan spesifik dan tiada terma kontrak atau ketiadaan terma-terma tersebut dalam kontrak boleh mengambil hak itu. Apabila draf perjanjian jual beli diluluskan oleh plaintif, ia membentuk kontrak antara pihak-pihak dan ATP tidak lagi berkuat kuasa. Tambahan lagi, tanah merupakan harta tak alih, perkara itu jatuh tepat di bawah bidang kuasa s 11(2) Akta Relief Spesifik 1950 (lihat perenggan 18).

(5) Ini adalah kes yang layak dan wajar untuk penghakiman terus dimasukkan terhadap defendan menurut A 81 k 1(a) KKM. Oleh itu permohonan plaintif telah dibenarkan mengikut terma-terma (lihat perenggan 21).]

Notes

For a case on draft agreement, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 6116.

For cases on contract, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 9008–9028.

Cases referred to

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah [2007] 2 MLJ 746, CA (refd)

Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor Appeal [1981] 1 MLJ 56, PC (refd)

Ho Kam Phaw v Fam Sin Nin [2000] 2 MLJ 529; [2000] 3 CLJ 1, FC (refd)

Kam Mah Theatre Sdn Bhd v Tan Lay Soon [1994] 1 MLJ 108, SC (refd)

Sandrifarm Sdn Bhd v Pegawai Pemegang Harta Malaysia [2000] 2 MLJ 535, CA (refd)

Seet Soh Ngoh v Venkateswara Sdn Bhd [1976] 1 MLJ 242 (refd)

Legislation referred to

Contracts Act 1950 s 7(a)

Rules of Court 2012 O 81 r 1, O 81 rr 1(a), 3, 4(1)

Specific Relief Act 1950 s 11(2)

Gan Techiong (Gan & Lim) for the plaintiff.

Rajeswary Girupai (Nadiah Kamaruddin with her) (Nora SW Lam & Assoc) for the defendant.

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Jul 24 12:19:34 2014

Abdul Rahman Sebli J:

[1] This is an application by the plaintiff, a Singaporean national for summary judgment under O 81 r 1(a) of the Rules of Court 2012 ('the Rules'). The relief sought is for specific performance of an agreement for the sale of a piece of land. The defendant is a Malaysian citizen resident in Australia. The basis of the application is that the defendant has no defence to the action. Rule 3 of O 81 stipulates as follows:

> Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action.

[2] By the terms of the provision what the court has to consider is whether there is any issue fit for trial. If there is none the plaintiff is entitled to judgment unless the defendant can satisfy the court that for some other reason there ought to be a trial. By virtue of O 81 r 4(1) of the Rules the defendant is required to show cause why judgment should not be entered against him. The phrase 'for some other reason' in r 3 of O 81 does not mean just any reason which a defendant may conjure up to create a difficulty. It must be a reason that has legal basis and is compelling enough to warrant a trial. A triable issue on the other hand is one that is not only determinative of the parties' rights but one that can only be resolved by viva voce evidence, ie evidence by word of mouth where the question(s) in dispute can be put to the test through the process of cross-examination. Facts that are not in dispute or if disputed can be established or rebutted by affidavit evidence are not triable. Facts so proved are as good as having been proved after a full hearing.

[3] Likewise settled points of law are not triable. As the law does not operate in a vacuum a question of law to be triable must relate to the facts in issue and not just any point of law unrelated to the question in dispute. In short, to succeed in resisting a summary judgment application under O 81 r 1 of the Rules the defendant must satisfy the court that he has a real prospect of successfully defending the claim.

[4] The transaction in the present case involved an agreement to sell and purchase a parcel of land located in the heart of Iskandar Region, Johor Bahru. The parties had on 1 February 2013 entered into a preliminary agreement in writing described as 'AGREEMENT TO PURCHASE' ('the ATP') and it was a term of the ATP (cl G.1) that the agreement was 'subject to the execution of a formal Sale & Purchase Agreement ('the SPA')'. The ATP was prepared by an estate agent on behalf of the plaintiff and the agreed purchase price was RM1,179,376. Before agreeing to the ATP the defendant had made amendments to the terms of the preliminary agreement, in particular by

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Jul 24 12:19:34 2014

inserting cl D.4 where he limits the plaintiff's claim to liquidated damages only in the event he (the defendant) failed to execute the sale and purchase agreement.

[5] After going through the negotiation process a draft sale and purchase agreement was prepared by the defendant's previous solicitors Messrs Tay & Partners and forwarded to the plaintiff for approval. The plaintiff promptly approved the draft agreement and returned it to the defendant for execution but the defendant refused to proceed with the sale. After keeping quiet for two months his solicitors wrote to the plaintiff informing him that the deal was off and refunded the 10% deposit to the plaintiff. Apparently he had a change of mind. In his affidavit in opposition affirmed before a notary public in Melbourne Australia the defendant claimed that he had every right to change his mind at any time before the sale and purchase agreement was formally signed by him. This is what he said in para 10.5 of the affidavit:

> 10.5 As the registered owner, of the property, I verily believe that it is within my rights to change my mind and to withdraw the invitation/proposal to sell the said Property at any time *BEFORE* I execute the said Sale and Purchase agreement. Besides it was merely a draft *Conditional Sale and Purchase Agreement only!* My solicitors will submit further at the hearing in due course. (Emphasis added.)

[6] The question for determination is whether there was a legally binding contract between the parties when the plaintiff signed the draft agreement submitted to him by the defendant's solicitors for his approval. Having gone through the pleadings, the affidavits and the arguments of both sides carefully I am inclined to agree with counsel for the plaintiff that the defendant has failed to raise any triable issue to warrant a full trial of the action. Nor is there 'some other reason' for holding a trial. Although the preliminary written agreement (the ATP) was expressed to be 'subject to the execution of a formal Sale & Purchase Agreement' the following facts, which are not in dispute and therefore deemed to be admitted, show that a valid and enforceable contract had been formed between the parties:

(a) the plaintiff at the defendant's request had paid the earnest deposit of 2% of the agreed purchase price of RM1,179,376. It makes no difference that the money was paid to the defendant's solicitors as stakeholder and not directly to the defendant. Clearly it was paid pursuant to the ATP to which the defendant was a party;

(b) through the ATP the defendant had confirmed his agreement to sell the land to the plaintiff at the agreed purchase price of RM1,179,376;

(c) a detailed amended draft sale and purchase agreement had been prepared by Messrs Tay & Partners and forwarded to the plaintiff for approval and the same had been approved by the plaintiff without qualification and

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Jul 24 12:19:34 2014

without amendment on 25 February 2013. Messrs Tay & Partners were the solicitors for the defendant in the transaction;

(d) on the same date, ie 25 February 2013 the plaintiff paid the balance 8% deposit amounting to RM94,349.60 to make up the full 10% deposit required by the defendant. It makes no difference that the money was paid to Messrs Tay & Partners as stakeholder and not to the defendant directly. Clearly the sum was paid pursuant to the ATP. The fact that the defendant refunded the deposit to the plaintiff is of no consequence. In any event the refund was rejected by the plaintiff; and

(e) the plaintiff had duly signed the final draft sale and purchase agreement prepared by the defendant's solicitors and returned all four copies to the defendant for execution.

[7] The principle is that where an agreement is 'subject to contract' there is a strong presumption that a further formal contract is needed and it requires cogent evidence to displace that presumption: *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108. In his judgment Peh Swee Chin SCJ delivering the judgment of the then Supreme Court quoted with approval the following passage by Sir Garfield Barwick in the Privy Council case of *Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor Appeal* [1981] 1 MLJ 56:

> The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question.

[8] It is for the court in each case to construe the correspondence exchanged between the parties to determine whether their 'agreement to make an agreement' had resulted in a contract: see *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625. In that case the Federal Court examined the correspondence between the parties and the objective aim of the transaction and came to the conclusion that the phrase 'subject to the sale and purchase agreement' appearing in the estate agent's letter did not point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. In other words, even though the parties had not signed a formal sale and purchase agreement an enforceable contract had come into existence as that was the result intended by the parties.

[9] There can be a concluded contract even where the parties contemplate

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu Jul 24 12:19:34 2014

the execution of a more formal document: *Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* [2007] 2 MLJ 746 (CA). Clearly therefore, the phrase 'subject to contract' or phrases of similar intonation are not conclusive of a party's desire not to be bound by the agreement until execution of a formal contract. The question for determination in each case is whether there was already *consensus ad idem* between the parties. On the facts of the present case it is clear that an objective intention to conclude an agreement had already existed between the parties. There is no dispute that in the course of the negotiation both the plaintiff and the defendant had made amendments to the draft sale and purchase agreement, the final amendments being made by the defendant before it was forwarded to the plaintiff for his approval. This is reflected in the letter dated 21 February 2013 written by Messrs Tay & Partners to the plaintiff on behalf of the defendant. Paragraph 2 of the letter reads:

> 2 Our client has commented on the draft Sale and Purchase Agreement (SPA) and we have made the amendments accordingly. The amendments are also in line with the contents of the Agreement to Purchase dated 12.12.2012. We hereby enclose herewith the *2nd draft SPA* (one in track changes format for your easy perusal and the other one with all amendments duly incorporated) for your approval.

[10] The letter is clear in its intent and purpose, namely:

(a) that the defendant had deliberated on the amendments made by the plaintiff and had made counter amendments;

(b) that the amendments made by the defendant were in line with the ATP;

(c) that the purpose of forwarding the amended draft agreement to the plaintiff was to obtain the plaintiff's approval; and

(d) that the law firm of Messrs Tay & Partners was acting for the defendant.

[11] In the same letter the defendant agreed to extend time for the plaintiff to sign the draft sale and purchase agreement by one week from 25 February 2013–1 March 2013. The extension of time was therefore given at the plaintiff's request. As it turned out the plaintiff did not wait until the extended date to sign the draft agreement. He decided to do so on the original deadline itself, ie 25 February 2013. In law there was already a concluded contract when the plaintiff approved the draft: *Ho Kam Phaw v Fam Sin Nin* [2000] 2 MLJ 529; [2000] 3 CLJ 1 (FC). At that point there was not only *consensus ad idem* between the parties but the necessary *animus contrahendi*. The defendant cannot now turn around and say that he did not intend to be immediately bound by the terms of the approved draft.

[12] The fact that the defendant set a deadline for the plaintiff to sign the agreement is clear proof that he had finalised his part of the bargain and was

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Thu Jul 24 12:19:34 2014

expecting the plaintiff not to make further amendments as the amendments that he made were 'in line with the contents of the Agreement to Purchase'. What the defendant was telling the plaintiff by the letter of 21 February 2013 was this: 'These are my terms and they are in line with the ATP prepared by your agent. You can accept them or you can reject them but if you accept them you must sign by 1st March 2013'. That was the clear message conveyed by the defendant to the plaintiff and the plaintiff acknowledged the message by approving the draft *in toto*. By doing so the plaintiff's acceptance of the amended draft agreement was absolute and unqualified within the meaning of s 7(a) of the Contracts Act 1950. There was therefore nothing more to negotiate. The negotiation had come to an end. What was left to be done was for the plaintiff to approve the final draft within the time set by the defendant, which he did, and for the defendant to countersign on the draft agreement to complete the deal. Any other summation would lead to the situation envisaged by Gopal Sri Ram JCA (as he then was) in *Charles Grenier*'s case where he said at p 335:

> Unless the approach we have stated is adopted, a party to a contract who after having concluded his bargain — entertains doubts as to the wisdom of the transaction, may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loophole and commerce would come to a virtual standstill.

[13] The defendant's allegation that he did not authorise Messrs Tay & Partners to forward the four copies of the amended draft agreement to the plaintiff for approval is a clumsy excuse to avoid the contract. Other than the defendant's self-serving allegation, there is no proof that Messrs Tay & Partners had no authority to act for the defendant. No document was produced to show that Messrs Tay & Partners had ceased to act for the defendant or that their services had been terminated by the defendant. More importantly nowhere in his pleadings nor in his affidavit in opposition did the defendant say that he had given specific instruction to Messrs Tay & Partners not to forward any draft agreement to the plaintiff for approval without first obtaining his permission.

[14] What is clear from the undisputed and uncontradicted contemporaneous documents is that Messrs Tay & Partners were specifically named as the defendant's solicitors in the correspondence between the parties and the defendant had handed his documents such as a copy of his identity card and quit rent receipt for the year 2013 to the firm for the purpose of concluding the sale. The instruction to act is implicit. If indeed Messrs Tay & Partners had acted without the defendant's instruction as alleged, his remedy lies in taking civil action against the law firm and not by avoiding the contract. Indeed this is what the defendant threatened to do in para 9.3 of his affidavit. In any case the plaintiff should not be made to suffer the consequences of someone else's

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Thu Jul 24 12:19:34 2014

A acts or omissions. It is therefore untenable for the defendant to argue that because his solicitors had acted without his instruction he is not bound to complete the sale. In all probability the allegation is an afterthought and an attempt to create an imaginary issue to deny the plaintiff of his right to judgment.

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[15] It is also the defendant's contention that whether or not the plaintiff had agreed to the amendments that the defendant made to the ATP is a serious question that ought to go for trial. The allegation is that on or around 9 February 2013 the estate agent had informed the defendant that the plaintiff C did not accept the defendant's amendments. It was argued that this dispute can only be resolved by putting the estate agent to the stand as a witness at the trial. With due respect I do not find any necessity for that. Even assuming for a moment that what the estate agent told the defendant is true, the letter dated D 21 February 2013 written by Messrs Tay & Partners to the plaintiff on behalf of the defendant followed by the plaintiff's approval of the draft sale and purchase agreement on 25 February 2013 would supersede any negotiation between the parties prior to 25 February 2013. The issue raised is therefore a non-issue in that even if it were to be decided in favour of the defendant at the E trial, it will not nullify the contract already established between the parties. It will be a waste of time to try a non-issue.

[16] The facts in *Sandrifarm Sdn Bhd v Pegawai Pemegang Harta Malaysia* [2000] 2 MLJ 535 bear some semblance to the facts of the present case. In that F case the vendor like the vendor in the present case had accepted a deposit from the purchaser but refused to proceed with the sale. In allowing the purchaser's appeal Shaik Daud JCA in delivering the judgment of the Court of Appeal held at p 538:

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> In the circumstances of this case, we find no difficulty in holding that a valid enforceable contract had materialized between the parties. The offer to sell was made by the respondent and this offer was accepted by the appellant. In accordance with the terms of the sale, the appellant remitted the 10% deposit amounting to RM190,000 which amount was duly received by the respondent and they issued a receipt for it. Therefore, a valid enforceable contract had been formed. The parties H have been identified, the property, the price and the terms too have been identified with sufficient certainty. Such an agreement is enforceable as if it was embodied in a sale and purchase agreement.

[17] It was argued in the alternative that even if there was a valid contract I between the parties, the plaintiff is not entitled to a decree of specific performance as there is no clause in the ATP to allow for such relief. According to counsel the plaintiff is only entitled to liquidated damages at 2% of the agreed purchase price as stipulated in cl D.4 of the ATP. Clause D.4 which was inserted by the defendant is couched in the following terms:

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Thu Jul 24 12:19:34 2014

> In the event the Vendor fails to execute the SPA within the Stipulated Period, the Vendor shall refund to the Purchaser the earnest deposit together with a sum equivalent to the earnest deposit as agreed liquidated damages (provided that there is no delay on the part of the Purchaser or Purchaser's Solicitors in agreeing to the normal terms and conditions of the SPA).

[18] I find no merit in the argument. In the first place it is trite law that parties cannot contract out of a statutory provision. Order 81 r (1)(a) of the Rules allows for the aggrieved party to apply for specific performance and no contractual term or the absence of such term in the contract can take away that right. Secondly, once the draft sale and purchase agreement had been approved by the plaintiff it formed the contract between the parties and the ATP ceased to have effect. Thirdly, land being immovable property the matter falls squarely within the purview of s 11(2) of the Specific Relief Act 1950 which provides as follows:

> Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation of money, and that the breach of a contract to transfer movable property can be thus relieved.

[19] It was argued however that the above provision only applies where there is a breach of contract and not where as in this case no breach had occurred. The short answer to the argument is that a valid contract had materialised between the parties and the defendant breached it when he refused to proceed with the sale. Since the applicable law relating to the plaintiff's right to specific performance is clear there is no need for a trial to determine the issue.

[20] Other than asserting that the plaintiff can be compensated by the 2% liquidated damages for his failure to proceed with the sale, which is unsustainable in law the defendant has not adduced any evidence that the plaintiff can adequately be relieved by compensation of money. In *Seet Soh Ngoh v Venkateswara Sdn Bhd* [1976] 1 MLJ 242 it was held that where a housing developer was attempting to breach the contract with the purchaser, damages would not be adequate remedy because of the tremendous increase in the value of land. The land involved in the present case is located in the Iskandar Region, Johor Bahru. It is common knowledge and I take judicial notice of the fact that the price of land in that area increases tremendously.

[21] For all the reasons stated above I find this to be a fit and proper case for summary judgment to be entered against the defendant pursuant to O 81 r 1(a) of the Rules. Accordingly the plaintiff's application is allowed in terms.

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Thu Jul 24 12:19:34 2014

A *Application allowed in terms.*

Reported by Afiq Mohamad Noor

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